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No.

In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

v.

AMERICAN TELEPHONE &
TELEGRAPH COMPANY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether Section 203(b)(2) of the Communications Act, 47 U.S.C. 203(b)(2) (Supp. III 1991), which authorizes the Federal Communications Commission to "modify any requirement" of Section 203, permits the Commission to make Section 203(a)'s tariff-filing requirement optional for telephone companies that lack market power.

PARTIES TO THE PROCEEDING

The petitioners are the United States of America and the Federal Communications Commission. MCI Telecommunications Corporation, an intervenor below, has filed a petition for a writ of certiorari, No. 93-356, seeking review of the judgment in this case.

The respondent is the American Telephone and Telegraph Company. In addition to MCI, the other intervenors in the court of appeals were the IBM Corporation, the United States Telephone Association, Pacific Bell and Nevada Bell, the Association for Local Telecommunications Services, the Cellular Telecommunications Industry Association, US Sprint Communications Company, the Competitive Telecommunications Association, the Bell Atlantic Telephone Companies, Local Area Telecommunications, Inc., the Ad Hoc Telecommunications Users Committee, Mobile Marine Radio, and the Southwestern Bell Corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes:

Miscellaneous:

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The Solicitor General, on behalf of the United States and the Federal Communications Commission, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The order of the court of appeals (93-356 Pet. App. 1a-2a) is unreported. The report and order of the Federal Communications Commission (93-356 Pet. App. 3a-36a) is reported at 7 F.C.C. Rcd. 8072. A prior decision that the court of appeals found controlling (93-356 Pet. App. 37a-56a) is reported at 978 F.2d 727.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 1993. On August 24, 1993, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including October 2, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 203 of the Communications Act of 1934, 47 U.S.C. 203 (1988 & Supp. III 1991), provides, in relevant part:

> **(a) Filing; public display**
>
> Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this chapter when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and

such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

(b) Changes in schedule; discretion of Commission to modify requirements

(1) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after one hundred and twenty days notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe.

(2) The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions except that the Commission may not require the notice period specified in paragraph (1) to be more than one hundred and twenty days.

(c) Overcharges and rebates

No carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this chapter and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any priv-

ileges of facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

STATEMENT

1. Section 203(a) of the Communications Act of 1934, 47 U.S.C. 203(a), provides that telephone companies "shall * * * file" tariff schedules listing the long distance services they offer and the rates they charge for those services. Section 203(b)(2) authorizes the Federal Communications Commission, "in its discretion and for good cause shown," to "modify any requirement" of Section 203. In the rulemaking order at issue here, the FCC modified the tariff-filing requirement of Section 203(a) by codifying previous orders permitting "non-dominant" telephone companies (those without market power) not to file tariffs. Under this "permissive detariffing" policy, long distance companies other than AT&T (which has a 60% share of that market, 93-356 Pet. App. 31a), are relieved of the burdensome tariff-filing requirement.

The Commission's permissive detariffing policy was a response to the introduction of competition in the long distance market in the 1970s. When Congress passed the Communications Act in 1934, AT&T monopolized the provision of long distance telephone service in the United States. See S. Rep. No. 781, 73d Cong., 2d Sess. 2 (1934) ("[t]his vast monopoly which so immediately serves the needs of the people in their daily and social life must be effectively regulated"). That monopoly persisted until technological advances and policy decisions by the FCC permitted the entry of new competitors to the marketplace for long distance telephone services.

In a series of orders beginning in 1979 in the *Competitive Carrier* rulemaking proceeding, *Notice of Inquiry and Proposed Rulemaking*, 77 F.C.C.2d 308 (1979), the FCC began to adopt rules reducing, in increments, the requirements imposed on telephone companies lacking market power. By reducing the regulatory burden imposed on carriers with small market shares, the FCC hoped to encourage entry into the telecommunications market and vigorous competition among those who entered. The Commission believed that reducing the regulatory burden was feasible because the forces of competition would effectively preclude non-dominant carriers from charging unjust and unreasonable rates in violation of Section 201(b) of the Act, or discriminating unreasonably in violation of Section 202(a) of the Act. See 77 F.C.C.2d at 334-338.

By 1983, the Commission had relieved most non-dominant carriers, such as MCI Telecommunications Corporation and US Sprint Communications Company, of the general obligation to file tariffs. See *Fourth Report and Order*, 95 F.C.C.2d 554 (1983). Non-dominant carriers nonetheless remained (and still remain) subject to the substantive requirements of Title II that their rates be just and reasonable and not unreasonably discriminatory. The approach adopted in the FCC's *Fourth Report* was called "permissive detariffing" because non-dominant carriers were permitted, but not required, to forbear from filing tariffs. The *Fourth Report* was not challenged on judicial review.

A subsequent order in the *Competitive Carrier* proceeding made the detariffing of non-dominant carriers mandatory: Under the rules adopted in that order, such carriers no longer were *permitted* to file

tariffs with the FCC. See *Sixth Report and Order*, 99 F.C.C.2d 1020 (1985). MCI challenged the *Sixth Report* in the D.C. Circuit, contending that it had the right under Section 203(a) to file tariffs. MCI won a ruling that the FCC lacks authority "to prohibit MCI and similarly situated common carriers from filing tariffs." *MCI Telecommunications Corp.* v. *FCC*, 765 F.2d 1186, 1188 (1985). In the 1985 decision invalidating mandatory detariffing, the D.C. Circuit declined to reach the question "whether the FCC's earlier permissive orders are invalid." *Id.* at 1196.

2. On August 7, 1989, AT&T initiated an administrative complaint proceeding against MCI. AT&T's complaint to the FCC alleged that MCI was providing interstate common carrier services to selected customers at rates not specified in MCI's tariffs, in violation of Section 203. AT&T thus challenged the FCC's permissive detariffing policy, despite having previously defended permissive detariffing before the FCC and in court. See *Sixth Report and Order*, 99 F.C.C.2d at 1027; *MCI Telecommunications Corp.* v. *FCC*, 799 F.2d 773 (D.C. Cir. 1986) (Table) (No. 84-1402), Br. for Intervenor AT&T Information Systems Inc. at 41-42.

The Commission denied AT&T's complaint insofar as AT&T sought damages for MCI's failure to file tariffs in the past. The Commission concluded that "it would be manifestly unfair to entertain AT&T's claim that MCI's alleged past conduct, which the Commission explicitly approved in advance, may give rise to a finding of liability." 93-356 Pet. App. 64a. With respect to AT&T's request for injunctive relief, the Commission concluded that "rulemaking proceedings are more appropriate for considering

general rules of widespread applicability." *Id.* at 65a. Accordingly, the Commission simultaneously initiated a rulemaking proceeding, with an expedited pleading cycle, to consider whether its permissive detariffing rules should be modified or repealed.

The Commission released its *Rulemaking Order*—the decision at issue in this case—in November 1992. The Commission retained the permissive detariffing rules and set forth a comprehensive analysis of the Commission's basis for those rules. 93-356 Pet. App. 3a-33a. The Commission found that since Congress in Section 203(b)(2) explicitly authorized modification of *any* requirement of Section 203 (with the limited exception that the Commission may not lengthen the 120-day notice period for changing tariffs), it was reasonable to conclude that Congress had intended the agency to have flexibility under the statute to carry out its mandate under 47 U.S.C. 151 "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." See 93-356 Pet. App. 12a-21a. Reviewing its nearly ten years of experience with the permissive detariffing rules, the Commission concluded that those rules had encouraged competition in the market for long distance services and increased customer choice with respect to carriers, services, and prices. *Id.* at 26a-31a. The rules thus served the Commission's mandate to make available efficient telecommunications services, while still allowing the agency to retain its ability to enforce the substantive ratemaking provisions of the Act.

3. On November 13, 1992—eight days after the FCC announced the completion of the expedited rulemaking proceeding but 12 days before the Commission released its opinion—the D.C. Circuit issued its judgment on AT&T's petition for review of the Commission's action on AT&T's complaint against MCI. The court first decided that the Commission had abused its discretion by failing to resolve the substantive issues raised by AT&T's complaint in that adjudicatory proceeding. 93-356 Pet. App. 44a-51a. The court then proceeded to consider the merits of the permissive detariffing rules established by the FCC. Although it was the mandatory detariffing policy established by the FCC's *Sixth Report* that had been at issue in *MCI* v. *FCC* and the court there had "explicitly reserved holding on the permissive detariffing scheme," the D.C. Circuit now interpreted its decision in that case as invalidating the FCC's permissive detariffing policy as well as mandatory detariffing. 93-356 Pet. App. 53a. The court noted that in the 1985 decision the court had interpreted "modify" in Section 203(b)(2) as authorizing the Commission to make only " 'circumscribed alterations' " in the requirements of Section 203. 93-356 Pet. App. 53a, quoting *MCI* v. *FCC*, 765 F.2d at 1192. In this case, the court held that authority " 'to change in incidental or subordinate features' " does not permit the Commission to relieve telephone companies "of the obligations to file tariffs under section 203(a)." 93-356 Pet. App. 53a, quoting *MCI* v. *FCC*, 765 F.2d at 1192.

MCI petitioned for a writ of certiorari, asking this Court to review the D.C. Circuit's judgment in the adjudicatory proceeding. The United States opposed

the petition, arguing that review would be premature until the court of appeals had an opportunity to review the *Rulemaking Order* and fully consider the Commission's justifications for its permissive detariffing policy. Certiorari was denied. *MCI Telecommunications Corp.* v. *AT&T*, 113 S. Ct. 3020 (1993).

AT&T sought review of the *Rulemaking Order* in the D.C. Circuit, and asked for summary reversal. The court of appeals granted AT&T's motion, stating that its decision in the adjudicatory proceeding "conclusively determined that the FCC's authorization of permissive detariffing violates Section 203(a) of the Communications Act." 93-356 Pet. App. 2a.

REASONS FOR GRANTING THE PETITION

The permissive detariffing policy is almost as old as the competitive long distance market and has played a major role in the development of that market, which now includes more than 400 competitors. The 1934 Congress that enacted the Communications Act could not have foreseen the technological advances that made that competition feasible. But in Section 203(b)(2), that Congress granted the Federal Communications Commission broad authority, "in its discretion and for good cause shown," and "either in particular instances or by general order," to "modify any requirement made by or under the authority" of Section 203, the provision that established the tariff-filing requirement. The D.C. Circuit's crabbed construction of Section 203(b)(2) improperly led that court—which has jurisdiction to review the validity of any future FCC rule or order on the subject—to invalidate the permissive de-

tariffing policy, and thus to remove "a cornerstone of the Commission's regulatory regime." 93-356 Pet. App. 8a.

1. The court of appeals read the language of Section 203 of the Communications Act too narrowly, and its decision fails to accord due deference to the Commission's interpretation of its governing statute and ignores Congress's understanding of that statute and its ratification of the FCC's regulatory policy.

a. Section 203(b)(2) authorizes the FCC to "modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions." The only limit Congress has placed on this broadly stated authority is that the Commission "may not require the notice period specified in paragraph (1) to be more than one hundred and twenty days." 47 U.S.C. 203(b)(2) (Supp. III 1991). The court of appeals, however, read Section 203(b)(2) as granting only the "limited authority" to make " 'circumscribed alterations.' " 93-356 Pet. App. 53a, quoting *MCI* v. *FCC*, 765 F.2d at 1192, quoting *Black's Law Dictionary* 905 (5th ed. 1979).

That reading of "modify" ignores broader definitions of the same term in other dictionaries and, indeed, is not compelled by the dictionary on which the court relied. *Webster's*, for example, alternatively defines "modify" to mean "to make minor changes in" *or* "to make basic or fundamental changes in often to give a new orientation to or to serve a new end." *Webster's New Collegiate Dictionary* 733 (1979). And *Black's*, on which the court relied, primarily defines "modify" as "to alter," which means "[t]o make a change in." *Black's Law Dic-*

tionary, supra, at 71. The FCC's permissive detariffing policy fits within that definition or the alternative definition given in *Webster's*.

Moreover, far from a "wholesale abandonment or elimination" of Title II of the Communications Act, see 93-356 Pet. App. 53a, the FCC's detariffing policy does no more than "alter in the direction of moderation or lenity" the resulting regulatory burden imposed by that Title. See 6 *Oxford English Dictionary* 576, entry 2 (1933 & reprint 1978). Under permissive detariffing, the sections of Title II that limit the rates a telephone company may charge and empower the FCC to enforce those limits continue to apply to all carriers. Rates must be just and reasonable and not unreasonably discriminatory. 47 U.S.C. 201(b), 202(a). The FCC retains its powers to investigate and prescribe rates, and to order refunds in some circumstances. 47 U.S.C. 205 (1988 & Supp. III 1991); see *New England Tel. & Tel. Co.* v. *FCC*, 826 F.2d 1101 (D.C. Cir. 1987), cert. denied, 490 U.S. 1039 (1989). The FCC also continues to receive rate complaints pursuant to its authority to investigate "in such manner and by such means as it shall deem proper," 47 U.S.C. 208(a), and to require carriers to pay damages or to cease and desist from unlawful conduct. 47 U.S.C. 207-209. In addition, the FCC may require carriers to file contracts and agreements when it deems necessary. 47 U.S.C. 211.

In adopting its interpretation of the FCC's authority to modify the requirements of Section 203, the court of appeals focused on Section 203(a)'s requirement that "*Every* common carrier, except connecting carriers, *shall*, within such reasonable time

as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers * * * and showing the classifications, practices, and regulations affecting such charges." *MCI* v. *FCC*, 765 F.2d at 1191. The court noted that " '[s]hall' * * * 'is the language of command,' " *ibid.*, and concluded that the FCC could not modify the requirements of Section 203(a). The court failed to address, however, to *whom* the command is directed. Clearly, a telephone company could not exempt itself from the tariff-filing requirement of Section 203(a), but the Commission, whose authority is derived from Section 203(b)(2), does not face the same limitations.

The court of appeals also overlooked the language in Section 203(b)(2) authorizing the Commission to modify "any" requirement of Section 203. The primary requirement of Section 203 is that telephone companies must file tariffs. If the authority to "modify any requirement" has meaning with respect to the tariff-filing requirement, it authorizes the Commission to relieve some carriers of that requirement. Under the D.C. Circuit's reading of "modify," however, relieving carriers of the tariff-filing requirement exceeds the Commission's "limited authority" to make " 'circumscribed alterations.' " 93-356 Pet. App. 53a, quoting *MCI* v. *FCC*, 765 F.2d at 1192. The D.C. Circuit's interpretation thus is significantly at odds with the statutory directive that the FCC may modify "any" requirement of Section 203.

The court's decision is also contrary to Section 203(c), which clearly anticipates that some carriers will provide untariffed service. Section 203(c) provides that "[n]o carrier, *unless otherwise provided*

by or under authority of this chapter, shall engage or participate in such communication unless schedules have been filed and published." 47 U.S.C. 203(c) (emphasis added). Plainly, the Commission has been granted authority to relieve carriers of the tariff-filing requirement, since the statute itself recognizes that it may be "otherwise provided * * * under authority" conferred by the statute that tariffs need not be filed.

The D.C. Circuit suggested that its decision is "somewhat buttressed" (93-356 Pet. App. 53a n.12) by *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990), where the Court held that the Interstate Commerce Commission could not excuse a trucker's deviation from its filed rates. Any support provided by the decision in *Maislin* is indeed limited. This case does not involve a trucker's deviation from a rate that it had filed with the ICC, but a rulemaking proceeding under another statute in which the FCC has concluded that certain telephone companies need not file tariffs. The question of Commission authority to authorize deviation from a rate that has been filed—the *Maislin* question—simply is not presented.

b. The court of appeals also ignored this Court's teaching that the Communications Act is "a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy." *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940). When Congress has delegated such policy-making authority to an agency, judicial deference to the agency's reasonable interpretations of its governing statute is required. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) ("a

court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency"). As the court of appeals has acknowledged, the 1985 decision on which it relied neglected to address *Chevron*. 93-356 Pet. App. 52a n.11. The court of appeals nevertheless failed to remedy that oversight because it concluded that the prior panel's decision foreclosed the argument. *Id.* at 53a. As we have shown, however, the FCC's policy is not merely a reasonable interpretation of the statute, it is the correct one. Even if not convinced by that argument, the D.C. Circuit erred in failing to defer to the Commission's interpretation, which is at least permissible, as the court of appeals suggested by concluding that the FCC's argument "was not insubstantial when made initially," 93-356 Pet. App. 52a, and as the alternative dictionary definitions show. See *National R.R. Passenger Corp.* v. *Boston & Maine Corp.*, 112 S. Ct. 1394, 1402 (1992) ("[t]he existence of alternative dictionary definitions * * *, each making some sense under the statute, itself indicates that the statute is open to interpretation").

c. Because the court in this case summarily reversed on the basis of its 1992 decision, the D.C. Circuit has never considered the Commission's argument that Congress has ratified the FCC's policy of detariffing non-dominant carriers. But as the Commission explained in its decision in this case, 93-356 Pet. App. 22a-25a, in 1990 Congress enacted the Telephone Operator Consumer Services Improvment Act of 1990 (TOCSIA), which requires non-dominant carriers offering operator-assisted service from locations such as pay phones and hotel rooms to file "informational tariff[s]." 47 U.S.C. 226(h)(1)(A) (Supp. III 1991). The committee reports specifically

noted that the FCC had chosen to forbear from requiring tariff filings by non-dominant carriers. See S. Rep. No. 439, 101st Cong., 2d Sess. 3 & n.10 (1990); see also H.R. Rep. No. 213, 101st Cong., 1st Sess. 3, 5-6 (1989). Thus, Congress was aware of the FCC's detariffing policy and chose not to disturb it when it was amending Title II of the Communications Act. See *Young* v. *Community Nutrition Inst.*, 476 U.S. 974, 983 (1986) (" 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.' *NLRB* v. *Bell Aerospace, Co.*, 416 U.S. 267, 275 (1974)").

In addition, as the Commission stated, 93-356 Pet. App. 23a, Congress's enactment of TOCSIA was built on a "baseline" of permissive detariffing. The "informational tariff[s]" required to be filed by common carriers under TOCSIA would be largely redundant if those carriers already were required to file tariffs under Section 203(a). It seems clear, however, that Congress did not intend to require redundant filings—it enacted Section 226(h) because it believed that non-dominant carriers are not required to file tariffs under Section 203(a).

2. Review by this Court is warranted because the D.C. Circuit's invalidation of the Commission's permissive detariffing policy will have a significant adverse effect on competition in the long distance telephone market.

a. The Commission initiated its review of the effects of the tariff-filing requirement on non-dominant carriers in 1979, when it concluded that tariff filings had "inhibiting effects on the[] service offerings" of smaller long distance carriers. *Competitive Carrier*, 77 F.C.C.2d at 313. The Commission noted that

three-quarters of the challenges to tariffs came from competitors rather than customers, and concluded that "it is apparent that these petitions are being used by competitors as a dilatory tactic to postpone commencement of service or rate changes by competing carriers." *Id.* at 314.

In 1981, the FCC concluded that requiring all carriers to file tariffs had other important adverse consequences on the newly competitive long distance market, particularly with respect to the services offered to business customers. In its 1981 order, the Commission explained that "the requirement that firms post their prices makes it difficult for those same firms to bargain with their customers over rates or to adjust them quickly to market conditions." *Further Notice of Proposed Rulemaking*, 84 F.C.C.2d 445, 454 (1981). In particular, the Commission stated, tariff filings make it difficult to provide discounts that would otherwise be offered. *Ibid.* Moreover, by filing petitions objecting to the tariffs, competitors may impose "substantial legal costs" on firms that offer discounts. *Ibid.* The expenses caused by tariffs are particularly burdensome on new entrants to the market, the Commission found. *Id.* at 453.

At the same time that tariffs inhibit discounting and discourage entry into the market, the Commission continued, "[t]ariff posting also provides an excellent mechanism for inducing noncompetitive pricing." 84 F.C.C.2d at 454. The Commission explained that the tariff-filing requirement makes all price reductions public, which means that "they can be quickly matched by competitors," thus "reduc[ing] the incentive to engage in price cutting" in the first place. *Ibid.* The Commission concluded that regulated competition pursuant to tariffs "all too

often becomes cartel management." *Ibid.* Moreover, the Commission continued, the primary justification for tariffing—preventing monopolists from extracting excessive profits—does not apply to those lacking market power, since "non-dominant firms are unable to do what the rules are designed to prevent them from doing anyway." *Id.* at 454-455. In short, the Commission said in 1981, "[a]pplying the tariff requirements to competitive entities * * * has worked the perverse effect of imposing a measure which (1) is superfluous as a consumer protection device, since competition circumscribes the prices and practices of these companies, and (2) stifles price competition and service and marketing innovation." *Id.* at 478-479. See *Great Atlantic & Pacific Tea Co.* v. *FTC*, 440 U.S. 69, 80 (1979) (duty of affirmative disclosure of prices may frustrate competitive bidding and lead to price matching and anti-competitive cooperation among sellers).

When it completed its review of its permissive detariffing policy in 1992, the Commission concluded that the evidence introduced in the rulemaking proceeding confirmed the findings it had made 11 years earlier. From 1982 to 1992, the number of long distance carriers had increased from about 12 to about 482. 93-356 Pet. App. 30a. And the market had become more competitive—while AT&T remained dominant, its share of the market had declined from 80% to 60%. *Id.* at 31a. The evidence specifically showed that the permissive detariffing policy had played a major role in fostering the development of competition in the long distance market. Some non-dominant carriers testified that the absence of tariffing requirements had allowed them to enter "niche markets" for the provision of long distance

service to businesses, and that they "likely would not have entered into the competitive fray at all" had they been subjected to tariffing. *Id.* at 29a & n.113. The Commission concluded, as a policy matter, "that the purposes of the Act would be thwarted if the Commission were to reimpose full tariff regulations on competitive, nondominant carriers." *Id.* at 29a.

b. While the permissive detariffing policy may seem abstruse, the Commission has concluded, and the telephone companies agree, that the policy has had significant effects on the development of the competitive long distance market. Except for some parties who would prefer the detariffing of all carriers, no one objects to permissive detariffing as a matter of policy. While striking down the Commission's *Rulemaking Order*, the D.C. Circuit stated "[w]e do not quarrel with the Commission's policy objectives." 93-356 Pet. App. 54a. And no one denies that the invalidation of the policy by the D.C. Circuit will have major consequences on the long distance market.

Moreover, this is not a case in which review should await the development of a conflict in the circuits. All final orders of the FCC are reviewable in the D.C. Circuit. 28 U.S.C. 2342, 2343. Accordingly, the Commission's options are limited—if it were to adhere to the permissive detariffing policy in any subsequent order, AT&T could petition for review in the D.C. Circuit. In light of the adverse effect of the D.C. Circuit's decision on this country's vital telecommunications markets, this Court should decide whether Section 203(b)(2) authorizes the Commission to modify the tariff-filing requirement of Section 203(a).*

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* The Commission has already responded to the D.C. Circuit's decision in this case through a rulemaking that adopted

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1993

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streamlined tariffing requirements for non-dominant carriers. *In re Tariff Filing Requirements for Nondominant Common Carriers*, CC Dkt. No. 93-36 (Aug. 18, 1993). Although the streamlined procedures—which AT&T has already challenged in the D.C. Circuit—may lessen the burden caused by the filing of tariffs, streamlined procedures cannot eliminate the anti-competitive effects of tariffs. Therefore, this Court should not decline to review the D.C. Circuit's decision in this case because the FCC has responded to that decision by adopting a position the Commission views as second-best. Rather, the fact that the Commission responded quickly to the D.C. Circuit's decision in this case by formulating a fall-back position highlights the fact that the Commission considers this issue to be of great practical importance.

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